ORAL ARGUMENT NOT YET SCHEDULED No. 12-5362

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION and SECURITES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION *Plaintiffs/Appellees*,

v.

COMMODITY FUTURES TRADING COMMISSION Defendant/Appellant.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR SENATORS LEVIN, BEGICH, BLUMENTHAL, BOXER, SHERROD BROWN, CANTWELL, CARDIN, FEINSTEIN, HARKIN, MANCHIN, MCCASKILL, MENENDEZ, MIKULSKI, BILL NELSON, SANDERS, SHAHEEN, WARREN, WHITEHOUSE, AND WYDEN AS AMICI CURIAE IN SUPPORT OF APPELLANT COMMODITY FUTURES TRADING COMMISSION

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A. Parties and Amici. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant Commodity Futures Trading Commission.

The following have appeared as *amici* in this Court:

Senator Mark Begich

Senator Richard Blumenthal

Senator Barbara Boxer

Senator Sherrod Brown

Senator Maria Cantwell

Senator Ben Cardin

Senator Dianne Feinstein

Senator Tom Harkin

Senator Carl Levin

Senator Joe Manchin, III

Senator Claire McCaskill

Senator Robert Menendez

Senator Barbara Mikulski

Senator Bill Nelson

Senator Bernie Sanders

Senator Jeanne Shaheen

Senator Sheldon Whitehouse

Senator Ron Wyden

Commodity Markets Oversight Coalition

B. Ruling Under Review. References to the ruling under review appear in the Brief for Appellant Commodity Futures Trading Commission. C. **Related Cases.** The Rule, which is the subject of this appeal, was previously before this Court in *Int'l Swaps & Derivatives Ass'n v. United States Commodity Futures Trading Comm'n*, No. 11-1469. That petition for review was dismissed by this Court for lack of jurisdiction on January 20, 2012. Counsel for *amici* is unaware of any related cases pending in this Court or any other.

/s/ Leon Dayan
Leon Dayan

Filed: 04/22/2013

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"2009 Wheat Report"	-	Staff Report, S. Permanent Subcomm. on Investigations, <i>Excessive Speculation in the Wheat Market</i> , S. Hrg. 111-155 (July 21, 2009)
"Ag. Vd."	-	DVD: October 21, 2009 Business Meeting (House Agriculture Committee 2009), Case No. 11-2146, Dkt. 37-2, Exh. B (Apr. 13, 2012)
"CEA"	-	Commodities Exchange Act
"CFTC"	-	Commodity Futures Trading Commission
"Dodd-Frank"	-	Dodd-Frank Wall Street Reform and Consumer Protection Act
"Engrossed Bill"	-	H.R. 4173, 111th Cong. (as passed by the House, Dec. 11, 2009)
"Enrolled Bill"	-	H.R. 4173, 111th Cong. (as passed by both House and Senate, Jan. 5, 2010)
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"Pls' Reply" - Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment, Case No. 11-2146, Dkt. 45 (D.D.C. Apr. 24, 2012)

"Prelim. Inj. Reply" - Reply Memorandum in Support of Plaintiffs' Application for a Preliminary Injunction, Case No. 11-2146, Dkt. 26 (D.D.C. Feb. 22, 2012)

"the Subcommittee" - U.S. Senate Permanent Subcommittee on Investigations

BRIEF OF AMICI CURIAE

This amici curiae brief is submitted in support of Appellant Commodity Futures Trading Commission ("CFTC" or "the Commission"). Amici urge this Court to reverse the District Court's order granting summary judgment in favor of the Appellees and denying the CFTC's motion for summary judgment.

INTEREST OF AMICI AND SOURCE OF AUTHORITY TO FILE

Amici Senators are committed to protecting United States commodity prices from the distortions caused by excessive speculation and market manipulation. Amici include 19 current United States Senators, many of whom played leadership roles in the development of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010) ("Dodd-Frank"). Amici are also members of Senate committees with jurisdiction over commodities, energy, banking, commerce, and related issues. Having spent nearly a decade investigating excessive speculation and price manipulation in U.S. commodities markets, the Senators seek to assist the Court in analyzing the legislative history to determine what Congress intended to accomplish by the position limits provisions of Dodd-Frank.

This brief is filed pursuant to the March 15, 2013 Order of this Court granting Senator Levin's Motion for Leave to File a Separate Amici Curiae Brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici state that no

party or person other than *amici* and their counsel participated in or contributed money for the drafting of this brief.

SUMMARY OF ARGUMENT

The CFTC correctly concluded that Dodd-Frank requires, and does not merely authorize, the Commission to set position limits as to certain commodities. The District Court's finding that Dodd-Frank is ambiguous on this point was erroneous. The Commission's interpretation is compelled, not only by the plain text of 7 U.S.C. § 6a(a) and "the language and design of the [Dodd-Frank] statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), but also by the legislative history of Dodd-Frank, which is the particular focus of this brief.

As this Court has recognized, legislative history is to be considered at step one of the process set out in *Chevron U.S.A.*, *Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether a statute is unambiguous as to a particular issue in dispute. *See, e.g., New York v. U.S. EPA*, 413 F.3d 3, 18 (D.C. Cir. 2005). Here, an examination of the legislative history of Dodd-Frank, including both its drafting history and the background of the Senate investigations against which it was enacted, confirm what the statutory text indicates: Dodd-Frank was designed and intended to make position limits mandatory. That backdrop includes seven years of Senate investigations finding excessive speculation in the commodities markets and calling for a more aggressive response from the CFTC.

ARGUMENT

A. The Dodd-Frank Text Evinces a Clear Intent to Make Position Limits Mandatory

The central issue in this appeal is whether the Dodd-Frank amendments to the Commodities Exchange Act ("CEA"), codified at 7 U.S.C. § 6a(a), mandated that the CFTC establish a new position limits regime as to "agricultural" and "exempt" commodities, which constitute two of the three classes of commodities governed by the CEA. The provision of Dodd-Frank most directly at issue is paragraph (2) of section 6a(a), which provides:

In accordance with the standards set forth in paragraph (1) of this subsection . . ., with respect to physical commodities other than excluded commodities . . ., the Commission *shall* by rule, regulation, or order establish limits on the amount of positions, as appropriate, . . . that may be held by any person with respect to contracts of sale for future delivery or . . . options on the contracts or commodities traded on or subject to the rules of a designated contract market.

7 U.S.C. § 6a(a)(2)(A) (emphasis added). The subparagraph that immediately follows is entitled "Timing" and provides that "[f]or exempt commodities, the limits *required* under subparagraph (A) shall be established within 180 days after

"Agricultural" commodities are, as their name suggests, farm commodities such as soybeans. "Exempt" commodities are non-agricultural physical commodities such as crude oil, natural gas, other energy commodities, and metals. Despite their name, "exempt" commodities are subject to significant regulation under the CEA. The third category – "excluded" commodities – are primarily financial in nature, such as interest rates and currencies. Again, the term "excluded" is something of a misnomer; these commodities are the least regulated, but not unregulated under the CEA. "Excluded" commodities are, however, mostly unaffected by the provisions of Dodd-Frank at issue here.

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[Dodd-Frank's enactment]" and "[f]or agricultural commodities, the limits required under subparagraph (A) shall be established within 270 days[.]" *Id*. § 6a(a)(2)(B) (emphasis added).

The Commission interpreted the statute as requiring it to set position limits for these two types of commodities by the statutory deadlines, leaving discretion only as to the particular level of the limits. The Commission asserted that the mandatory "shall" directive meant what it said, and that the introductory "in accordance with" clause of paragraph (2) did not undo the mandate, but served to ensure that pre-existing aggregation and flexibility standards set out in paragraph (1) were carried forward in the new Dodd-Frank regime.

The District Court acknowledged that "Congress used traditionally mandatory language throughout the Dodd-Frank amendments to Section 6a[,]" but nevertheless found that "there are at least two plausible readings of the statute"—the Commission's and the Appellees' construction, under which the Commission was not required to impose limits by the deadlines, but instead retained the same discretion to refrain from imposing limits as it had under the pre Dodd-Frank regime. See Int'l Swaps & Derivatives Ass'n v. United States Commodity Futures Trading Comm'n, 887 F. Supp. 2d 259, 279 (D.D.C. 2012). That regime gave the Commission complete discretion as to whether or when to institute regulatory proceedings that could lead to the imposition of position limits, and, according to Appellees, made the agency's ability to impose a position limit on a particular

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commodity dependent upon an agency finding that a limit as to that commodity was "necessary to diminish, eliminate, or prevent [a] burden" on interstate commerce. 7 U.S.C. § 6a(a)(1). According to Appellees, the "in accordance with" clause was intended to carry forward into the Dodd-Frank regime not only the aggregation and flexibility standards discussed above, but also all of the prerequisites to the establishment of position limits that existed before Dodd-Frank —including the need for the CFTC to exercise its discretion to initiate proceedings and the asserted need for the CFTC to make commodity-by-commodity "necessity" findings. The only effect of section 6a(a)(2), under Appellees' interpretation, was to direct the Commission "to consider new position limits" within 180 or 270 days, "and to impose them if" the Commission finds them "'necessary' to combat 'excessive speculation." Pls' Reply, Case No. 11-2146, Dkt. 45 (D.D.C. Apr. 23, 2012) at pp. 10, 2 (emphasis added).

In finding Appellees' interpretation "plausible" and, on that basis declaring section 6a(a)(2) to be ambiguous, the District Court misconstrued the language of the statute and failed to give effect to the intent of Congress.

"As in all statutory construction cases, [the Court must] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). In examining the statutory

language, the District Court gave short shrift to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citations omitted). Instead of reading the Dodd-Frank amendments "as a whole," the District Court spent the bulk of its opinion "constru[ing] statutory phrases in isolation," *Samantar v. Yousuf*, 130 S. Ct. 2278, 2289 (2010) (citations omitted), an exercise that led it to find the position limits provisions "ambiguous in isolation" when their meaning would have been "clarified by the remainder of the statutory scheme[.]" *Smith v. United States*, 508 U.S. 223, 233 (1993) (citations omitted).

As we now show, when all of Dodd-Frank's provisions are read together as a whole, the conclusion becomes inescapable that Dodd-Frank effects a shift from a regulatory regime in which discretionary agency action was a prerequisite to the establishment of government-imposed position limits (such that non-regulation was the default rule) to one in which regulation through CFTC-imposed position limits is the mandatory norm for "agricultural" and "exempt" commodities (such that regulation is now the default rule as to those commodities).

Congress' intent to make position limits mandatory is apparent, first of all, from the text of the provision directly at issue here, section 6a(a)(2). Most obvious is that provision's direction that the CFTC "shall . . . establish" position limits as to agricultural and exempt commodities. Notwithstanding the fact under certain rare

circumstances "shall" has been interpreted as permissive, federal courts have repeatedly recognized the normally uncompromising directive it carries. *See, e.g.*, *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"). As discussed below, Congress' choice to use "shall" instead of "may" was deliberate and it reflected Congress' considered decision to impose a duty upon the agency to establish position limits. *See infra* at pp. 10-11.

Congress' intent to require position limits is further supported by the provision's repeated references to position limits as "required." See, e.g., 7 U.S.C. § 6a(a)(2)(B) ("[T]he limits required under subparagraph (A) shall be established within 180 days after [Dodd-Frank's enactment]" (emphasis added)); id. § 6a(a)(2)(C) ("In establishing the limits required under subparagraph (A), the Commission shall..." (emphasis added)). Courts have long recognized that the use of the word "required" is different from the word "permitted." See, e.g., In re *Boyd*, 213 F. 774, 775-76 (2d Cir. 1914) ("The words 'require' and 'permit' express different ideas; in the ordinary use of the English language the one does not include the other. Presumably Congress knew what these words meant and used them to express such meaning. Presumably, . . . it did this intentionally and not by some oversight."). Had Congress intended to make position limits discretionary, it is inexplicable that it would have referred to them as "required."

Moreover, Congress' decision to impose tight—and *unconditional* deadlines is also illuminating. The statute provides that "[f]or exempt commodities," (i.e. commodities such as metals and energy that are neither agricultural nor financial, see n. 1 supra) "the limits required under subparagraph (A) shall be established within 180 days after [Dodd-Frank's enactment.]" 7 U.S.C. § 6a(a)(2)(B). For agricultural commodities, "the limits required under subparagraph (A) shall be established within 270 days[.]" *Id*. If Appellees' theory as to Congressional intent were correct, these timing provisions would have been drafted to reflect the possibility that position limits might not be imposed at all. Instead, Congress chose to direct the agency to establish position limits within a set period, chose to do so unconditionally, and chose to describe those limits as "required." Appellees' reading of the statute would nullify all of those deliberate choices by Congress.

Further textual proof comes from section 719 of Dodd-Frank, which requires the agency "[w]ithin 12 months after the imposition of position limits pursuant to the other provisions of this title," to conduct "a study of the effects (if any) of the position limits imposed pursuant to the other provisions of this title on excessive speculation and on the movement of transactions from exchanges in the United States to trading venues outside the United States" and to report to Congress on the results of that study. See Dodd-Frank § 719 (now codified at 15 U.S.C. §§ 8307(a), (b)). A Congress that believed position limits to be discretionary

would have adopted language that entertained the possibility that no position limits would be imposed and hence that no report would be necessary. The Dodd-Frank Congress, by contrast, used language suggesting that position limits were an unconditional requirement and not some uncertain eventuality that might not come to pass. The only uncertainty expressed by Congress concerns whether the limits imposed would, upon *post*-imposition study, prove to have any effect on excessive speculation. Congress asked the Commission to report on "the *effects* (if any) of the position limits imposed" and did *not* ask the Commission to decide for itself whether position limits should be imposed in the first instance.

In sum, the text of Dodd-Frank—read as a whole—leaves no room for an interpretation that would allow the CFTC to refrain from imposing any limits at all.

B. Dodd-Frank's Legislative History Confirms Congress' Intent to Make Position Limits Mandatory

"As in all cases of statutory construction, [the Court's] task is to interpret the words of the[] statute[] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). It is well-settled that judicial consideration of a statute's legislative history is an appropriate means of discerning those purposes. *See, e.g., Pub. Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991). And this Court has held that it may consider legislative history at *Chevron* step one to determine whether the statute is unambiguous as to

the issue in dispute. See, e.g., New York, 413 F.3d at 18 (considering "the Act's language, legislative history, structure, and purpose" at *Chevron* step one).

1. The Drafting History of Dodd-Frank Demonstrates Congress' **Intent to Make Position Limits Mandatory**

The conclusion that Congress intended position limits to be a mandatory obligation of the CFTC follows not only from the text of Dodd-Frank as enacted, but from the development of the Dodd-Frank bill over the course of several drafts. Courts regularly rely on earlier drafts of a bill to ascertain Congressional intent. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("The evolution of these statutory provisions supplies further evidence [of Congress' intent]...").

a. The House Bill Text Shifted from Discretionary to **Mandatory**

When the House version of the bill that later became Dodd-Frank was first introduced, the language concerning the CFTC's role with respect to the adoption of position limits was consistent with Appellees' view that position limits were discretionary. First, that draft authorized the CFTC to "proclaim and fix" position limits on "swaps that perform or affect a significant price discovery function with respect to a regulated market." See H.R. 4173, 111th Cong. § 3113(a)(2) (as introduced in the House, Dec. 2, 2009) ("Introduced Bill"). It did so by adding a clause to section 6a(a)(1), the section that sets out the CFTC's general authority to regulate. The Introduced Bill provided that "[t]he Commission may, by rule or regulation, establish limits . . . on the aggregate number or amount of positions in

contracts based upon the same underlying commodity . . . that may be held by any person" with regard to, *inter alia*, swaps. *See id*. § 3113(a)(5)(2) (emphasis added). "May," of course, is a "plainly permissive" term, *Christensen v. Harris Cnty.*, 529 U.S. 576, 587-88 (2000), which provided the CFTC with the *authority* to establish position limits, but did not require it to do so.

By the time the bill passed the House on December 11, 2009, however, it had been modified in two significant ways. First, the House changed the permissive "may" to "shall" in the aggregation provision, thereby requiring the CFTC to aggregate positions across markets. *See* H. R. 4173, 111th Cong. § 3113(a)(5)(7) (as passed by the House, Dec. 11, 2009) ("Engrossed Bill"). The previous "use of the permissive 'may' . . . contrast[ed] with the legislators' use of a mandatory 'shall'. . . . Congress used 'shall' to impose discretionless obligations[.]" *Lopez v. Davis*, 531 U.S. 230, 241 (2001).

Second, the House added two entirely new subsections, again using the imperative "shall," providing that "the Commission *shall* by rule, regulation, or order establish limits on the amount of positions, as appropriate," with regard to futures, options, and swaps. *See* Engrossed Bill at § 3113(a)(5)(2) (emphasis added). The two new subsections supplemented the statute's general grant of authority by providing that, in the case of "agricultural" and "exempt" commodities, the Commission was mandated to act and not merely permitted to do so. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a

commonplace of statutory construction that the specific governs the general"). In other words, at the same time the House shifted from a permissive to mandatory regime with regard to aggregation, it also added specific controlling provisions requiring the establishment of position limits.

The proposition that use of the word "shall" marked the evolution of the Dodd-Frank bill from permissive to mandatory is reinforced by the evolution of the other cognate provisions of the bill. For example, while the final version of Dodd-Frank repeatedly refers to position limits as "required," *see supra* at p. 7, nowhere does the permissive version of the bill describe position limits as "required." Indeed, it was precisely when the statutory language shifted from "may" to "shall" in the version that passed the House that the first provision referring to position limits as "required" appeared. *See* Engrossed Bill at § 3113(a)(5)(3). The final bill contains three additional references to the limits as "required," each of which was added by the Conference Committee, showing that both Houses intended to reinforce this point. *Compare* Engrossed Bill at § 3113 *with* 7 U.S.C. § 6a(a)(2),(3).

It is also highly revealing that the Introduced Bill, which provided that the CFTC "may" establish aggregate position limits, did not include the final bill's study and reporting provision, directing the agency "[w]ithin 12 months after the imposition of position limits pursuant to the other provisions of this title," to issue a report to Congress on the results of "a study of the effects (if any) of the position

limits imposed pursuant to the other provisions of this title." See 15 U.S.C. §§ 8307(a), (b). A report of that kind would have been out of place in the Introduced Bill, in which position limits were a mere possibility contingent on the CFTC's exercise of discretion to establish them. And sure enough, the Engrossed Bill, the first version of Dodd-Frank to contain the mandatory "shall" language, was also the first version of Dodd-Frank to contain the study and reporting requirement. See Engrossed Bill at § 3005(a). Once Congress decided to require the agency to establish position limits, it also added a provision requiring the agency to study and report their effects.

The same is true of the timing provisions. The Introduced Bill containing the permissive "may" formulation did not set any deadlines for establishing position limits. In contrast, both the Engrossed Bill and the final law set tight and unconditional deadlines for establishing the "required" limits. Compare Introduced Bill at § 3113 (no timing provisions), with Engrossed Bill at § 3113 (limits on "exempt commodities" "shall be established within 180 days after" enactment; limits on "agricultural commodities" "shall be established within 270 days after" enactment), and 7 U.S.C. § 6a(a)(2)(B) (same).

These differences between the Introduced Bill and the Dodd-Frank law are stark. The former granted authority to the CFTC, but no more. It would have permitted the CFTC to establish position limits, but set no deadlines for their establishment; it did not refer to the limits as "required"; and it contained no

accountability mechanism to assess their effectiveness. The final law, by contrast, contains mandatory language ("shall . . . establish"), a tight timeline for their establishment (within 180 or 270 days), and a mandatory study and reporting requirement.

b. The Bipartisan Peterson Amendment Strengthened the House Bill

These changes in the bill language are primarily the result of an amendment added to the bill on the House floor by Representative Collin Peterson on December 10, 2009. *See* 155 Cong. Rec. H14496, H14682 (daily ed. Dec. 10, 2009). The language in his amendment had previously been approved by the House Agriculture Committee ("the Committee"), which he chaired. The Committee's discussion at an October 21, 2009 Business Meeting clearly shows that all members understood that the position limits provision would make the imposition of position limits mandatory. The meeting began with an explanation by the Committee's counsel who stated that the provision "requires the CFTC to establish position limits on swaps that perform a significant price discovery function and require[s] aggregate limits across markets." *See* DVD: October 21, 2009 Business Meeting (House Agriculture Committee 2009) ("Ag. Vd."), Dkt.

37-2, Exh. B (Apr. 13, 2012) at 38:46. Counsel noted that the provision "requires CFTC to establish position limits on futures transactions for physically-deliverable commodities that are applicable to spot month, each month, and all months aggregated." *Id.* at 38:57. Each Committee member also received a document containing a "section-by-section analysis" of the provision, with the same explanation. See Over-the-Counter Derivatives Markets Act of 2009, Section-by-Section Analysis (Oct. 21, 2009), http://agriculture.house.gov/sites/republicans. agriculture.house.gov/files/inside/Legislation/111/hr3795_amdt_sbs.pdf.

In the discussion that followed, statements made in favor of and in opposition to the provision reflected an understanding that position limits would be mandatory. None indicates that any Member viewed the position limits provision as simply permissive. For example, Representative Halvorson proposed adding a provision that "would require the CFTC to develop and implement position limits for all trading venues simultaneously . . . to ensure that we do not incentivize market participants to escape the limits imposed by trading on venues where the limits do not apply." See Ag. Vd. at 1:09:24. The amendment was adopted by the Committee and later became section 6a(a)(5)(B). See Halvorson Amendment (Oct.

² Because the record of the Business Meeting is in videotape form, the citations herein identify the times at which the referenced statements appear on the video.

Representative Goodlatte voiced serious concerns with the position limits requirement, explaining:

It would have been my preference that we move forward with legislation that simply shines the light of day on these transactions, that increases the disclosure requirements and reporting requirements, and so on, but waited until we saw more clearly what was going on with these trades before we started imposing position limits because we simply don't know what impact the position limits are going to have in terms of the competiveness of U.S. exchanges.

See Ag. Vd. at 59:55. Acknowledging that he did not have enough votes for his preferred "approach of looking at transparency first or the approach of waiting to see what we can accomplish by way of international agreement," Representative Goodlatte proposed a "study . . . that requires a report back to the Congress by the [CFTC] within a year on the impact that these decisions that we make here today have on the competitiveness of the U.S. exchanges" Id. at 1:01:28. This way "if they report back and say, we are losing business, well, let us rescind these limits and start anew." Id. at 1:02:18. Had Representative Goodlatte believed the bill to merely authorize the CFTC to set position limits following a study of their necessity, there would be no reason to be as concerned with "decisions we make here today" or to provide a mechanism for Congress to "rescind these limits and start anew." The Goodlatte proposal was adopted by the Committee and later became section 719 of Dodd-Frank. See Goodlatte Amendment (Oct. 21, 2009),

http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/inside/Leg islation/111/023Goodlatte.pdf.

When Chairman Peterson introduced the Committee-approved language through his amendment on the House floor on December 10, 2009, see 155 Cong. Rec. H14496, H14682 (daily ed. Dec. 10, 2009), he explained that "this amendment is the product of years of public debate about the regulation of derivatives markets in the United States." See id. at H14705 (statement of Rep. Peterson). He noted that as a result of the "price volatility we saw in energy futures markets," his Committee conducted investigations and found that "trillions of dollars in transactions affecting commodity prices were being conducted out of sight and out of reach of market regulators." Id. In order "to finally bring real accountability and oversight," Chairman Peterson urged the adoption of his amendment, which "strengthens confidence in trader position limits on physically deliverable commodities as a way to prevent excessive speculation trading. . . . " *Id.* at H14705-06. Following debate, the House adopted the Peterson amendment. See id. at H14709.

c. The Senate Accepted the House Approach

Meanwhile, the Senate went to work on its own version of the bill. On May 20, 2010, the Senate passed its version of Dodd-Frank, which contained mandatory language ("shall . . . establish"), but a less detailed explication of the position limits requirement. *See* 156 Cong. Rec. S4034, S4078 (daily ed. May 20, 2010).

For example, the Senate version did not include deadlines for rulemaking or a study and reporting requirement. *Id.* The Senate then requested a conference to resolve the differences between the Senate and House versions of the bill. The House, unwilling to adopt the Senate version of the bill, agreed to conference.

Ultimately, the Conference Committee adopted the more detailed language of the House bill with regard to position limits, while adding three more references to the position limits as "required." *Compare* Enrolled Bill § 3113 (one reference to position limits as "required") *with* 7 U.S.C. § 6a(a)(2),(3) (four references to position limits as "required"). On July 21, 2010, the agreed-upon language became law.

At each step in the legislative process, Congress made the position limits requirement stronger. It started with permissive language, which the House made mandatory when it adopted the Peterson amendment. Then, when faced with a choice between the House bill and a less detailed Senate bill that lacked deadlines for the establishment of position limits and contained no accountability mechanism to assess the limits' effectiveness, the Conference Committee chose the House language and further clarified that the position limits were "required."

2. The "In Accordance With" Clause Does Not Render the Position Limits Provision Ambiguous

Acknowledging that the statutory language in section 6a(a)(2) and its cognate provisions "seemingly create a mandatory regime," the District Court

nonetheless found the statute to be ambiguous. *Int'l Swaps & Derivatives Ass'n*, 887 F. Supp. 2d at 279. The District Court so concluded based principally on the premise that the CFTC's interpretation renders the first clause of section 6a(a)(2) "mere surplusage." *Id.* That clause provides that the CFTC shall set position limits "[i]n accordance with the standards set forth in paragraph (1) of this subsection[.]" 7 U.S.C. § 6a(a)(2).

But the "in accordance with" clause of section 6a(a)(2) is *not* "mere surplusage," and has "operative effect" under the CFTC's interpretation, because it makes clear that when establishing the position limits required by paragraph (2), the CFTC must act in accordance with the aggregation and flexibility standards set forth *only* in paragraph (1). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). Most notable is the requirement that the Commission aggregate "positions held and trading done by any persons directly or indirectly controlled by such person," 7 U.S.C. § 6a(a)(1), which the Commission has referred to as the "aggregation *standards*" for over thirty years. *See* 46 Fed. Reg. 50938, 50645 (Oct. 16, 1981) (emphasis added). The aggregation standards provided for in section 6a(a)(1) are a critical component of a successful position limits scheme.

³ The language in paragraph (1) that embodies the "flexibility standards" permits the Commission, *inter alia*, to "fix[] different trading or position limits for different commodities, markets, futures, or delivery months, or for different number of days remaining until the last day of trading in a contract, or different

trading limits for buying and selling operations. . . . " 7 U.S.C. § 6a(a)(1).

Since 1979, the Commission has interpreted section 6a(a)(1) to require aggregation of positions in which a "person has a financial interest of 10 percent or more." 44 Fed. Reg. 33839, 33843 (June 13, 1979). Without aggregation standards, traders could easily circumvent position limits by having subsidiaries or related entities engage in transactions in excess of the limits. And without the "in accordance with" clause, the aggregation standards would not necessarily apply to the *new* position limits required by paragraph (2). Such a legislative gap could result in the elimination of any aggregation standard governing those who exercise control "directly or indirectly" over another trader, thereby allowing for easy circumvention of the Dodd-Frank mandate.

The "in accordance with" clause therefore plainly has "operative effect" under the CFTC's interpretation; it ensures that the Commission will apply the same aggregation and flexibility standards to position limits mandated in subsection (2) (i.e., those governing "exempt" and "agricultural" commodities) as it applies to position limits established pursuant to the separate discretionary authority set out in paragraph (1) (i.e., those governing "excluded" commodities). "As the Supreme Court has recognized, a provision that may at first glance appear to be textual surplusage, may in fact 'perform [] a significant function simply by clarifying." Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n, 533 F.3d 810, 818 (D.C. Cir. 2008) (quoting United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007)).

In addition to laboring under the mistaken premise that the CFTC's interpretation would render the "in accordance with" clause surplusage, the District Court also believed that the agency's interpretation would render all of the language in paragraph (1) except the aggregation and flexibility standards "mere surplusage." Int'l Swaps & Derivatives Ass'n, 887 F. Supp. 2d at 275. Here, too, the District Court was mistaken.

The remaining parts of paragraph (1) to which the District Court referred include the clause "directing the Commission to set position limits only 'as the Commission finds are necessary to diminish, eliminate, or prevent such burden [on interstate commerce]." Id. (quoting 7 U.S.C. § 6a(a)(1)). But that clause most assuredly continues to have operative effect under the CFTC's interpretation. In particular, it continues to govern when the CFTC exercises its discretion to impose position limits with respect to "excluded commodities" to which subsection (2) does not even apply. See supra at p. 3 & n. 1.

The CFTC's interpretation thus renders *neither* the "in accordance with" clause in paragraph (2) nor the necessity clause in paragraph (1) "surplusage." And since the District Court's conclusion that the relevant portions of Dodd-Frank were "ambiguous" rests entirely on the premise that the CFTC's interpretation of the statute rendered both of these clauses "surplusage," we could close with the observation that the rejection of the District Court's premise compels rejection of

its conclusion. There are, however, additional reasons for rejecting the District Court's conclusion.

First, the District Court's conclusion that it is "plausible" to read the "in accordance with" clause in the manner urged by Appellees—i.e., as an incorporation of the discretionary regime of prior law—violates the very "surplusage" canon of construction on which the District Court (erroneously) relied. Indeed, it violates that canon in a particularly profound way, since adopting Appellees' interpretation would render numerous separate provisions of the Dodd-Frank amendments surplusage. See Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1178 (2013) (noting that the canon against surplusage applies with its greatest force when an interpretation "would render superfluous []other part[s] of the same statutory scheme").

According to Appellees, the Dodd-Frank amendments were meant merely to "add[] swaps to the Commission's regulatory ambit" and to "instruct the Commission to *consider* new position limits," but not to impose them unless the paragraph (1) "necessity" findings were first made. Pls' Reply at p. 10 (emphasis added). That would be a fair description of the *originally introduced* Dodd-Frank bill, which, as noted, simply added a clause to section 6a(a)(1) to include swaps.

See supra at p. 10. But it is a fatally flawed description of the Dodd-Frank statute Congress actually enacted, for Appellees' construction ascribes no meaning to Congress' deliberate decision to add a whole series of new subsections after

section 6a(a)(1) that, as to "exempt" and "agricultural" commodities, repeatedly use the term "required" in describing the new position limits. *See supra* at pp. 12-13.

Not only does Appellees' interpretation render these new subsections surplusage, it renders other provisions inexplicable, such as (1) Congress' decision to subject the CFTC to tight deadlines that are incompatible with a discretionary regime, *see supra* at p. 8; *see also* Brief for the Appellant, Dkt. 1429287 (Apr. 5, 2013) at pp. 33-34; and (2) Congress' decision to require the CFTC to report to Congress within a year on the effect of the new position limits—a provision that, as noted, takes it as a given that the CFTC will be *establishing* limits, rather than merely *considering* whether to do so.

Beyond failing to make sense of the text that Congress actually adopted, Appellees' interpretation also fails to make sense of what key members of Congress said about the Dodd-Frank bill as it evolved through the drafting process. The "in accordance with" clause was added to Dodd-Frank as part of the Peterson amendment described above. *See* 155 Cong. Rec. H14496, H14682. As noted, it is clear from the statements made during the amendment process that members of both parties understood it to make position limits mandatory, *see supra* at pp. 15-18, and it is also clear that that understanding was communicated to the entire House, which adopted the amendment, *see* H.R. Rep. No. 111-370 at 11 (2009) (summarizing the Peterson amendment as one that "*requires* the CFTC to establish

of CFTC-imposed position limits.

3. Congress Did Not Intend to Require the CFTC to Make a Necessity Finding Before Implementing Position Limits

In addition to being inconsistent with the text and the immediate drafting history of Dodd-Frank, Appellees' contention that Congress intended the CFTC merely to "gather evidence relating to whether excessive speculation was harming commodity markets," Prelim. Inj. Reply, Case No. 11-2146, Dkt. 26 (D.D.C. Feb. 22, 2012) at p. 9, is also impossible to square with nearly a decade of legislative studies leading up to Dodd-Frank, which concluded that "excessive speculation [in the commodities markets] distorts prices, increases volatility, and increases costs and risks for" consumers. *See* Staff Report, S. Permanent Subcomm. on Investigations, *Excessive Speculation in the Natural Gas Market*, S. Hrg. 110-235 at 207 (June 25 and July 9, 2007) ("2007 Natural Gas Report").

From 2002 until 2009, the U.S. Senate's Permanent Subcommittee on Investigations ("the Subcommittee"), a Senate investigative body known for

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lengthy investigations into complex matters, initiated a series of bipartisan studies and hearings examining the role of excessive speculation in determining the price of key commodities. These investigations reflected the Subcommittee's "concern over the sustained increases in the price and price volatility of these essential commodities, and . . . the adequacy of governmental oversight of the markets that set these prices." See S. Permanent Subcomm. on Investigations, The Role of Market Speculation in Rising Oil and Gas Prices: A Need to Put the Cop Back on the Beat, S. Prt. 109-65 at 1 (June 27, 2006) ("2006 Oil and Gas Report"). The Subcommittee held hearings and released detailed, bipartisan reports on specific commodity markets.

Each investigation concluded that excessive speculation had increased consumer prices and price volatility for the commodity in question. For example, with regard to the wheat market, the Subcommittee released a 261-page bipartisan report, which found that "[t]he large number of wheat futures contracts purchased and held by commodity index traders . . . constituted excessive speculation [and] . . . was a major contributing factor in the increasing difference between wheat futures prices and cash prices from 2006 to 2008." See Staff Report, S. Permanent Subcomm.on Investigations, Excessive Speculation in the Wheat Market, S. Hrg. 111-155 at 180 (July 21, 2009) ("2009 Wheat Report"); see also 2007 Natural Gas Report at 207 (510-page, bipartisan report finding that the natural gas positions held by a hedge fund known as Amaranth "constituted excessive speculation" and

that "Amaranth's actions in causing significant price movements in the natural gas market demonstrate that excessive speculation distorts prices, increases volatility, and increases costs and risks for natural gas consumers. . . . ").

The Subcommittee investigations also decried the lack of regulation in these markets. For example, the Subcommittee found that the CFTC's decision to "grant[] position limit exemptions to swap dealers selling commodity index swaps" had allowed six exempt index traders to hold up to 60% of all outstanding wheat contracts held by index traders from 2006 to mid-2008. See 2009 Wheat Report at 177-79. The investigation concluded that "the granting of [position limits] exemptions and waivers" was "inconsistent with" the CFTC's responsibility to prevent excessive speculation in the commodities markets. Id. at 179. Instead, the Subcommittee investigation recommended "strict enforcement" of position limits in the wheat market. *Id*.

The Subcommittee's work was repeatedly discussed in the Senate in the late 2000s, as Congress attempted to address "historical increases" in the price of oil, gas, and other commodities. See, e.g., 153 Cong. Rec. S15433, S15442 (daily ed. Dec. 13, 2007) (statement of Sen. Snowe) ("[S]avvy consumers strongly suspect these prices are being manipulated. Frankly, their analysis is supported by a Senate subcommittee report, leading economists, [and] the GAO..."); 153 Cong. Rec. at S15443-44 (statement of Sen. Levin) (discussing the Subcommittee's work on excessive speculation and position limits); 153 Cong. Rec. at S15442 (statement of

Sen. Feinstein) (same); 154 Cong. Rec. S4212, S4240-41 (daily ed. May 15, 2008) (statement of Sen. Levin) (same); *see also* Joint Hearing, S. Permanent Subcomm. on Investigations and S. Subcomm. on Energy, S*peculation in the Crude Oil Market*, S. Hrg. 110-382 (Dec. 11, 2007).

Additionally, in light of the Subcommittee's findings, Senators Levin, Bingaman, and Harkin introduced the Prevent Excessive Speculation Act of 2008, S. 3577, "to enact the strongest and most workable measures to prevent excessive speculation and price manipulation" by "clos[ing] the loopholes in our commodities laws" to "ensure that large commodity traders cannot . . . hide from CFTC oversight or avoid limits on speculation." See 154 Cong. Rec. S9494, S9494 (daily ed. Sept. 25, 2008) (statement of Sen. Levin). Senator Levin stated that his bill "would require the CFTC to set [position] limits . . . to prevent traders from engaging in excessive speculation or price manipulation." *Id.* at S9494 (emphasis added). Senator Levin introduced the bill again in 2009. Although neither bill was enacted on its own, section 6, which required the CFTC to set position limits—and included the same "in accordance with the standards" language found in Dodd-Frank—foreshadowed the position limits provisions of Dodd-Frank.

Congress' own studies were unequivocal in finding that the lack of position limits for certain transactions and in certain markets contributed to "the sustained increases in the price and price volatility of these essential commodities[.]" *See*

2006 Oil and Gas Report at 1; see also 2009 Wheat Report at 181 ("waiv[ing] position limits for commodity index traders facilitated excessive speculation").⁴ Appellees' suggestion, therefore, that in the wake of what Congressional studies indicated was a period marked by the rapid expansion of unregulated commodity swap instruments, an explosion of commodity speculation in both the swaps and futures markets, and unprecedented increases in commodity prices and volatility, Congress wanted the CFTC to do no more than "consider" position limits and conduct duplicative studies rings hollow. A more logical conclusion, and the only one that is consistent with the statutory language and legislative history, is that having determined that the level of speculation in the commodities markets was excessive, and that position limits were too often missing, Congress directed the CFTC to impose mandatory position limits within a specified time period, and to report back to Congress within twelve months on any resulting effects.

⁴Investigations by other Congressional committees or members of Congress reached similar conclusions about excessive speculation in U.S. commodity markets. *See, e.g., Testimony of Representative Stupak, CFTC Hearing on Energy Position Limits and Hedge Exemptions* (July 28, 2009), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072809_stupak.pdf ("[E]xcessive speculation is a significant factor in the price Americans are paying for gasoline, diesel and home heating oil."); *Testimony of Senator Sanders, CFTC Hearing on Energy Position Limits and Hedge Exemptions* (July 28, 2009), http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/hearing072809_sanders.pdf ("[W]e now know that speculators artificially drove up electricity prices on the West Coast in 2000; propane prices in 2004; and natural gas prices in 2006.").

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's order.

Respectfully submitted,

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Dated: April 22, 2013

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- 1. This brief complies with the type-volume limitations of Circuit Rule 32(a)(2)(B) and Fed. R. App. P. 29(d) because this brief contains 6,821 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
- 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in a 14-point type in a Times New Roman font style.

Date: April 22, 2013

/s/ Leon Dayan
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Filed: 04/22/2013

CERTIFICATE OF SERVICE

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